UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON JUDGES DIVISION

BETHANY COLLEGE

and **Case Nos. 14-CA-201546**

THOMAS JORSCH, an Individual **14-CA-201584**

and

LISA GUINN, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S POST-HEARING BRIEF TO THE ADMINSTRATIVE LAW JUDGE

Rebecca Proctor
Counsel for the General Counsel
National Labor Relations Board, Subregion 17
8600 Farley—Suite 100
Overland Park, KS 66212

I. STATEMENT OF THE CASE

This case was heard by Administrative Law Judge Christine Dibble on December 6, 2017, based on a Complaint that Bethany College (Respondent) violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (Act). The Consolidated Complaint and Notice of Hearing was issued by Region 14 on August 30, 2017, alleging Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad confidentiality rule, by asking employees not to disclose a proposed tenure plan, by sending an email prohibiting employees from discussing terms and conditions of employment with each other, and by informing employees they were being terminated for engaging in protected, concerted activities. The Consolidated Complaint and Notice of Hearing alleges Respondent violated Sections 8(a)(1) and 8(a)(3) of the Act by discharging employees Thomas Jorsch and Lisa Guinn for engaging in protected, concerted and Union activity and to discourage employees from engaging in protected, concerted, and Union activity.

Prior to hearing, Respondent through its Answer and through a Pre-Hearing Motion to Dismiss/Motion for Summary Judgment, argued the Board lacked jurisdiction due to Respondent's status as a religiously-affiliated college. Respondent claimed that it could not participate in any Board proceedings without waiving its jurisdictional arguments. Respondent also filed Petitions to Revoke subpoenas based in part on these same grounds. Respondent raised the jurisdictional issues again at hearing when, through counsel, Respondent affirmed on the record that due to its jurisdictional arguments it would not participate in the hearing and would not produce subpoenaed documents or subpoenaed witnesses.

II. PRE-HEARING FILINGS

A. Respondent's Motion to Dismiss/Motion for Summary Judgment

On November 8, 2017, Respondent filed a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment with the National Labor Relations Board (Board). In its Motion, Respondent claimed that the Board lacked jurisdiction over Respondent due to Respondent's status as a religiously-affiliated college. Counsel for the General Counsel filed a response opposing Respondent's Motion on November 13, 2017. As the Board had not issued a decision on Respondent's Motion prior to the December 6, 2017 hearing opening, ALJ Dibble heard oral argument on Respondent's Motion. Because it was unclear if the Board would rule on the Motion to Dismiss/Motion for Summary Judgment prior to ALJ Dibble issuing a decision, the hearing record was left open for the limited purpose of ALJ Dibble considering documents associated with Respondent's Motion to Dismiss/Motion for Summary Judgment. Tr. 95-96. On December 6, 2017, shortly after the hearing closed, the Board issued an order denying Respondent's Motion. As the Board denied Respondent's Motion, this issue is no longer before the ALJ; Respondent's documents should be excluded from the record and the record should be closed.

B. Respondent's Petition to Revoke Subpoenas

On November 13, 2017 Respondent was served with a subpoena duces tecum and Respondent's supervisors and agents William Jones, Robert Carlson, and Joyce Pigge were served with subpoenas ad testificandum. GC Ex. 3, GC Ex. 2a-2c. On November 20, 2017, Respondent filed petitions to revoke all four subpoenas. As referenced above, Respondent based many of its arguments for revocation of the subpoenas on its jurisdictional claims, stating that

Respondent cannot be required to participate in a Board proceeding if the Board lacks jurisdiction. Counsel for the General Counsel filed a response opposing Respondent's Petitions on November 24, 2017. On December 1, 2017, ALJ Dibble denied Respondent's petitions to revoke subpoenas. On December 5, 2017, Respondent filed a Motion to Reconsider. ALJ Dibble took oral argument on Respondent's Motion at the December 6, 2017 hearing, and denied Respondent's Motion.

Despite ALJ Dibble's ruling, Respondent stated it would not comply with the subpoena duces tecum or the subpoenas ad testificandum and would not produce any documents or witnesses. Although Respondent's counsel was present for the hearing, following oral argument Respondent's counsel moved away from the counsel table and attended the hearing only as a spectator. Respondent affirmatively chose not to present any evidence and not to take an active role in the hearing process.

III. MOTIONS FOR EVIDENTIARY SANCTIONS

Due to Respondent's failure to comply with any of the issued subpoenas, Counsel for the General Counsel moved for evidentiary sanctions. Respondent's claim that it cannot be required to produce documents or witnesses due to Respondent's jurisdictional arguments is not based in Board law, does not effectuate the purposes of the Act, and undermines the integrity of the hearing process. Respondent openly and admittedly refused to comply with all subpoenas issued. Because Respondent simply ignored all subpoenas and made no effort to comply, all available sanctions should be imposed.

A. Legal Standard

Once served a subpoena duces tecum, a party has an obligation to make a good faith effort to gather responsive documents; a party that ignores a subpoena pending ruling on a petition to revoke does so at its peril. *McAllister Towing and Transportation*, 341 NLRB 394, 396-397 (2004), enfd 156 Fed. Appx. 386 (2nd Cir. 2005). The Board has authority to impose a variety of sanctions for subpoena non-compliance. *Id* at 396-397. The Board's authority to impose sanctions is rooted in the Board's inherent "interest in maintaining the integrity of the hearing process." *NLRB v. C.H. Sprague & Son, Co.*, 428 F.2d 938, 942 (1st Cir. 1970); *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998).

Authority to sanction a party for non-compliance with any Board subpoena is a matter committed in the first instance to the judge's discretion. *McAllister Towing*, 341 NLRB at 396; *Teamsters Local 19 (Peerless Importers)*, 345 NLRB 1010, 1011 (2005); *NLRB v. American Art Industries*, 415 F.2d 1223, 1229-1230 (5th Cir. 1969), cert. denied 397 U.S. 990 (1970); *Midland National Life Insurance Co.*, 244 NLRB 3, 6 (1979). Courts have generally upheld the trial judge's authority to issue evidentiary sanctions, and the Board's authority to issue evidentiary sanctions, even when the General Counsel has elected not to initiate court enforcement proceedings. *Perdue Farms, Inc. v. NLRB*, 144 F. 3d at 834. In most cases, the need for sanctions arises after a party explicitly and deliberately refuses to comply with a valid subpoena. *Essex Valley Visiting Nurses Assn.*, 352 NLRB 427, 440-441 (2008); *San Luis Trucking, Inc.*, 352 NLRB 211, 213-214 (2008).

The trial judge has discretion to impose all or a portion of available sanctions, depending on the circumstances. *Bannon Mills*, 146 NLRB 611, 613 n. 4, 633-634 (1964); *McAllister*

Towing and Transportation, 341 NLRB 394, 396-397 (2004), enfd. 156 Fed.Appx. 386 (2nd Cir. 2005); *San Luis Trucking*, 352 NLRB 311, 212 (2008); *Hedison Mfg. Co. v. NLRB*, 643 F.2d 32, 34 (1st Cir. 1927). The sanctions available for non-compliance with a subpoena duces tecum include, "permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party." *McAllister Towing*, 341 NLRB at 396. The ALJ may also strike portions of the pleadings that were affected by non-compliance with the subpoena. *Equipment Trucking Co*, 336 NLRB 277, 277 fn. 1 (2001).

Available sanctions for non-compliance with a subpoena ad testificandum include prohibiting the non-complying party from calling the same witnesses and drawing adverse inferences against that party. *Rogan Brothers Sanitation, Inc*., 362 NLRB No. 61, slip op at 3 n. 9 (2015); *Carpenters Local 405*, 328 NLRB 788, 788 n.2 (1999).

There is substantial precedent supporting application of evidentiary sanctions for non-compliance with either a subpoena duces tecum or a subpoena ad testificandum. In this case, Respondent did not comply, or even attempt to comply with any of the subpoenas issued, making evidentiary sanctions warranted and appropriate.

B. Evidentiary Sanctions Are Warranted

1. Respondent Was Served With Valid Subpoenas

As noted above, Respondent's custodian of records was served with a valid subpoena duces tecum and Respondent's supervisors/agents William Jones, Robert Carlson, and Joyce Pigge were served with valid subpoenas ad testificandum. GC Ex. 2, GC, Ex. 3. The subpoenas sought documents and testimony regarding issues raised in the Consolidated Complaint as well

as documents and testimony regarding the jurisdictional claims made in Respondent's Answer and pre-hearing filings. Respondent and its agents clearly received the subpoenas, as Respondent filed a timely Petition to Revoke for each issued subpoena.

2. Respondent Failed to Comply With the Subpoenas

As previously referenced, Respondent filed Petitions to Revoke the subpoena duces tecum and the three subpoenas ad testificandum, and filed a Motion to Reconsider when the Petitions were denied. Despite denial of the Motion to Reconsider, Respondent refused to produce a single responsive document, refused to produce a single subpoenaed witness, and refused to take any role in the hearing process. Respondent's refusal is documented on the record. Tr. 27-28.

3. Respondent Seeks an Unfair Advantage/Undermines the Hearing Process

As noted above, Respondent openly refused to provide any subpoenaed witnesses or documents. Yet when Counsel for the General Counsel moved for evidentiary sanctions, Respondent's counsel stated, "…we would reserve the right to present any evidence to challenge any witnesses, or otherwise argue on the merits of the matter until, and if such time, as a Court of competent jurisdiction determines that the NLRA applies to the College and that the NLRB has jurisdiction over the College." Tr. 28. Respondent's attempt to reserve a right to present any evidence or challenge any witnesses even after not complying with subpoenas and not participating at hearing is a bald attempt to gain unfair advantage. Respondent wants to wait, until the full case has been presented and decided, and then and only then determine what, if any, evidence it will present. Such conduct, if allowed, completely undermines both the purpose and integrity of the hearing process.

Respondent's claim that it cannot participate in hearing and preserve its jurisdictional arguments is not supported by any law or precedent. As argued in Counsel for the General Counsel's Brief Opposing Respondent's Motion to Dismiss/Motion for Summary Judgment, "the Board has the duty of determining in the first instance (the jurisdiction) of the National Labor Relations Board and that the Board's determination must be accepted by reviewing courts if it has a reasonable basis in the evidence and is not inconsistent with the law." *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398, 403 (1947). The *E.C. Atkins* decision is a decision of the Supreme Court of the United States, certainly a court of competent jurisdiction. Accordingly, under both the Board's Congressional mandate, and Court precedent, the Board determines in the first instance when to exercise jurisdiction and when to decline jurisdiction. Under the statutory and legal framework, a hearing before the ALJ is the correct and proper forum for Respondent to make and support its jurisdictional arguments. Only once the evidentiary record is created, and a jurisdictional ruling made based on that record, may Respondent seek review of that jurisdictional ruling by a court.

Respondent's arguments and positions misstate the process and the law and reflect total disdain for the Board. Respondent's refusal to comply could not have been more explicit or deliberate, and Respondent both openly and knowingly declined to make any evidentiary showings at hearing. Such conduct undermines the integrity of the hearing process and does not effectuate the purposes of the Act. Respondent's conduct is flagrant and deliberate, and the full range of available evidentiary sanctions should be imposed.

4. Sanctions are Warranted

a. An Adverse Inference Should be Drawn

The adverse inference rule "provides that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *UAW v. NLRB*, 459 F.2d 1329, 1345 (D.C. Cir. 1972). The failure to produce relevant evidence "not only strengthens the probative force of its absence, but of itself is clothed with a certain probative force." *Id.* at 1348, quoting *Paudler v. Paudler*, 185 F. 2d 901, 903 (5th Cir. 1950) cert. denied, 341 U.S. 920 (1951). A party's willingness to defy a subpoena to suppress evidence strengthens the force of an adverse inference. *UAW v. NLRB*, 459 F.2d at 1352.

Respondent failed to produce the three subpoenaed supervisors/agents, and failed to provide any subpoenaed documents, the bulk of which were standard business and employment records. All witnesses and documents were within Respondent's control, and should have been easily produced. Additionally, two of the three subpoenaed witnesses were present at hearing of their own volition but Respondent's counsel would not allow them to testify. An inference should be drawn that the subpoenaed documents and the subpoenaed witnesses would have provided evidence damaging to Respondent's case. The adverse inference should be particularly strong regarding Joyce Pigge and Robert Carlson, the two witnesses who appeared at hearing but were not allowed to testify by Respondent's Counsel. Such a sanction is necessary and appropriate, given the extent of Respondent's conduct.

b. The Preclusion Rule Should be Applied

A preclusion sanction serves two purposes: to prevent the party frustrating production of evidence from gaining an unfair advantage by introducing evidence in support of his position on the factual issues for which evidence was sought and to protect the integrity of the Board's process by deterring misconduct such as "flagrant defiance of valid subpoenas." *McAllister Towing*, 341 NLRB at 402; *NLRB v. C.H. Sprague & Sons Co.*, 428 F.2d 938, 942 (1st Cir. 1970). "Whether it be production of a document or testimony as a witness, it is the deliberate refusal to timely produce or testify that is the critical element of abuse of Board subpoena process, and/or indicative of an adversary's intended imposition of an unfair evidentiary disadvantage upon his opponent." *People's Transportation Service*, 276 NLRB 169, 222 (1985).

Here, Respondent failed to provide both the subpoenaed documents and the subpoenaed witnesses, and yet attempts to preserve the right to provide any witnesses or evidence it chooses at a later date. As discussed above, this constitutes abuse of the Board subpoena process and is an attempt to disadvantage Counsel for the General Counsel. Respondent is represented by counsel and should be well aware that refusal to comply with a subpoena risks application of the preclusion rule. The preclusion rule is necessary to maintain the integrity of the hearing process; failure to apply the preclusion rule incentivizes employers to simply ignore Board subpoenas. "Without an adequate evidentiary sanction, a party served with a discovery order in the course of an administrative adjudicatory proceeding has no incentive to comply, and offtimes has every incentive to refuse to comply." *Atlantic Richfield Co. v. U.S. Dept of Energy*, 769 F.2d 771, 795 (D.C. Cir. 1984).

If the preclusion rule is not applied, and Respondent is allowed at any point post-hearing to enter any evidence into the record, it will only embolden other employers to emulate Respondent and similarly thumb their noses at Board procedure and Board subpoenas. Respondent's conduct has thoroughly earned it a preclusion sanction, and the sanction should be applied.

c. The General Counsel Should Be Allowed to Present Secondary Evidence

Because Respondent did not comply with the subpoenas, Counsel for the General Counsel should be allowed to present secondary evidence, including testimony instead of documents and hearsay testimony. *Bannon Mills*, 146 NLRB 611, 614 n.4 (1964); *American Art Industries*, 166 NLRB 943, 951-53 (1967); *Roofers Local 30 (Associated Builders and Contractors, Inc.)*, 227 NLRB 1444, 1449 (1977).

Counsel for the General Counsel sought to obtain all relevant documents in this case and sought testimony from individuals who participated in relevant conversations with the Charging Parties. Neither Jorsch nor Guinn has had access to Respondent's email system or other electronic systems since June 2017. Accordingly, Charging Parties cannot access a number of relevant documents or records. Charging Parties had conversations with Respondent's agents regarding their employment, both in person and over electronic mail, and Counsel for the General Counsel made efforts to obtain information about those conversations through subpoenas. Respondent is the only party with access to many relevant documents and witnesses, and it creates an unfair advantage for Respondent if testimony about the relevant emails and conversations is disregarded. Respondent's failure to comply with the subpoenas has, in some

instances, resulted in secondary evidence being the only available evidence. Accordingly, that secondary evidence should be allowed and given probative value.

d. Portions of the Pleadings Should Be Stricken

There is significant Board precedent for striking the answer of an employer who refuses to comply with a subpoena duces tecum. *Equipment Trucking Co*., 336 NLRB 277, 277, n.1, (2001); *Bannon Mills, Inc.* 146 NLRB 611, 613 fn4, 633-634 (1964); *Ingalls Shipbuilding*, 242 NLRB 417, 421 fn.7 (1979); *American Art Industries*, 166 NLRB 943, 951-53 (1967) affd. 415 F.2d 1223, 1229-30 (5th Cir. 1969) cert. denied 397 U.S. 990 (1970). Because Respondent did not put on any evidence at hearing, Respondent's "case" is made primarily through its Answer and pre-hearing filings. In the normal course of the hearing process, the points in these documents would be fleshed out and explored with testimony and evidence. Because Respondent did not comply with the subpoenas, and did not participate at all during hearing, Respondent should not be allowed to use these unsupported statements and allegations as grounds for any future arguments.

As previously referenced, the subpoena duces tecum sought information pertaining both to the unfair labor practice allegations and to Respondent's jurisdictional arguments. The sections of the Answer relating to these issues are Paragraphs 8, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24 and Affirmative Defenses No. 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, and 15. Respondent has tried, both through its Answer and through its Motion to Dismiss/Motion for Summary Judgment, to make its case selectively with minimal evidence and zero scrutiny. Because Respondent did not produce the subpoenaed documents necessary to support or explore the claims in Answer Paragraphs 8, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24 and Affirmative

Defenses No. 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, and 15, these sections should be stricken. Again, Respondent is represented by counsel, and should be aware that failure to comply with a valid subpoena can result in this evidentiary sanction.

e. Respondent's Conduct is Severe and Warrants Sanctions

Board cases where sanctions are imposed overwhelmingly involve parties who have refused to comply, in full or in part, with the Board's subpoena and hearing process. It would be difficult to find an employer more uncooperative and more obstructive than Respondent. Respondent's utter refusal to provide evidence and take part in the hearing process is a textbook example of conduct warranting sanctions. Such conduct, if allowed, is extremely damaging to the integrity of Board procedures and to the Act itself. Respondent's obstruction should be met with the strongest and most severe evidentiary sanctions to discourage other employers from engaging in such destructive, obstructive behavior.

IV. JURISDICTIONAL STANDARDS

By denying Respondent's Motion to Dismiss/Motion for Summary Judgment, the Board acknowledged that these particular issues involve questions of fact. Resolving those questions of fact requires an evidentiary record. Regardless of what jurisdictional standard Respondent believes applicable, the burden is on Respondent to put forth evidence and testimony to prove lack of jurisdiction. Although Respondent has made two jurisdictional arguments, Respondent failed to make the required evidentiary showings to support either of those arguments. Because Respondent did not comply with the subpoenas, or put on any evidence at all, Respondent has not met its burden to establish either that Respondent as an employer is outside of the Act's jurisdiction or that Charging Party Thomas Jorsch is an employee outside of the Act's

jurisdiction. Again, this is Respondent's burden regardless of which jurisdictional standard is applied.

A. Religious-Affiliated Colleges and Universities--Current Standard

The current standard for determining jurisdiction over religiously-affiliated colleges or universities comes from *Pacific Lutheran University*, 360 NLRB 1404 (2014). Jurisdictional analysis under *Pacific Lutheran* requires a college or university disputing jurisdiction on the basis of religious affiliation to first demonstrate it holds itself out as providing a religious education environment. *Pacific Lutheran*, 1410. Once that requirement is met, the college or university must show that the faculty member(s) at issue perform a religious function, necessitating a showing that it "holds out those faculty as performing a specific role in creating or maintaining the university's religious educational environment." *Pacific Lutheran*, 1410-1411. This portion of the analysis focuses on the individual faculty member; there must be a "connection between the performance of a religious role and faculty members' employment requirements." *Pacific Lutheran*, 1413, n.14.

The Board will exercise jurisdiction unless the college or university can make both showings. Whether the initial threshold is met is a factual determination that can only be made through evidence, testimony, and credibility determinations. The second portion of the test is even more fact-intensive, as it requires examination of individual faculty members' responsibilities. Citing the College Handbook does not meet this test.

> Generalized statements that faculty members are expected to, for example, support the goals or mission of the university are not alone sufficient. These types of representations do not communicate the message that the religious nature of the university affects faculty members' job duties or requirements. *Pacific Lutheran*, 1413.

It must be established that there is a connection between performance of a religious role and employment requirements. As with the threshold test, determining whether such a connection exists is a factual determination requiring evidence, testimony, and credibility determinations.

B. Religious-Affiliated Colleges--Previous Standard

Pacific Lutheran represents an attempt to refine the Board's jurisdictional test for religiously-affiliated colleges and universities. Before *Pacific Lutheran*, jurisdiction over all church operated schools, regardless of whether the school was a preschool or a university, was determined based on the "substantial religious character" test adopted after the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). The Court in *Catholic Bishop* determined that the Board should not exercise jurisdiction over a school with "substantial religious character" so post-*Catholic Bishop*, the Board made jurisdictional determinations by deciding on a case-by-case basis whether a religiously-affiliated school had a substantial religious character. The Board's decision to refine this test for colleges and universities was based on the significant size, organizational, and operational differences between colleges and universities and other types of church-operated schools.

A fairly thorough discussion of the substantial religious character test is included *University of Great Falls and Montana Federation of Teachers*, 331 NLRB 1663 (2000). The Board wrote, "The Board has not relied solely on the employer's affiliation with a religious organization, but rather has evaluated the purpose of the employer's operations, the role of the unit employees in effectuating that purpose and the potential effects if the Board exercised jurisdiction." *Great Falls*,1664-65.

Under the substantial religious character test, the Board reviewed, among other factors,

- The degree of the school's religious mission;
- The school's organizational structure;
- Whether the school educates individuals regardless of their faith or limits its enrollment to those adhering to the school's religion;
- The nature of the required religious courses paying particular attention to whether instruction in the school's specific faith is a significant part of the curriculum;
- Whether the school provides a comprehensive secular education, and if so, whether this or the religious component predominates;
- Whether faculty members are required to adhere to any particular religious faith or conduct themselves in accord with religious tenets; and
- The school's significant funding sources.

The Board also considered such factors as the involvement of the religious institution in the daily operation of the school, the degree to which the school has a religious mission and curriculum, and whether religious criteria are used for appointment and evaluation of faculty." *Great Falls*, 1666. The Board could consider, "on a case-by-case basis, all aspects of a religious school's organization and function that [it deems] relevant." *Trustee of St. Joseph's College*, 282 NLRB 65, 68 n. 10 (1986). Like *Pacific Lutheran*, the substantial religious character test required the college or university contesting jurisdiction to make the necessary evidentiary showing to establish lack of jurisdiction.

The DC Court of Appeals, reviewing the Board's decision in *Great Falls*, subsequently proposed and applied a different three-step test. Although Respondent's jurisdictional arguments relied heavily on the DC Circuit's test, prior to *Pacific Lutheran* the Board neither adopted nor rejected that test. However, in *Pacific Lutheran*, the Board openly rejected the DC Circuit's test. *Pacific Lutheran*, 1409. Accordingly, the DC Circuit's test has never been valid Board law.

C. Faculty as Managerial Employee—Current Test

The Board's current test for determining the managerial status of university employees is also found in *Pacific Lutheran University*, 361 NLRB 1404 (2014). In *Pacific Lutheran*, the Board refined the test established in *NLRB v. Yeshiva University*, 444 US 672 (1980). The Board stated it will determine whether faculty members are managerial employees as follows:

> We will examine the faculty's participation in the following areas of decisionmaking: academic programs, enrollment management, finances, academic policy, and personal policies and decisions, giving greater weight to the first three areas than to the last two areas. We will then determine, if in the context of the university's decision making structure and the nature of the faculty's employment relationship with the university, whether the faculty actually control or make effective recommendation of those areas. If they do, we will find that they are managerial employees and therefore excluded from the Act's protections. *Id.* at 1424.

The Board will examine "both the breadth and depth of the faculty's authority at the university." *Id.* at 1420. For the primary areas, academic programs is defined to include curricula, major and minor areas of study, and related academic requirements. Enrollment management includes the size, scope, and composition of the student body. Finances include budget, tuition, and financial aid. *Id.* at 1421. For the secondary areas, academic policy is defined to include teaching and research methods, grading policy, academic integrity, and related areas. Personnel policy is defined to include hiring, promotion, tenure, and leave. *Id.* at 1421.

Accordingly, like whether the college itself is outside of the Act's jurisdiction, determining whether Thomas Jorsch was a managerial employee is highly fact intensive determination requiring examination of Dr. Jorsch's particular and specific responsibilities in the three primary and two secondary areas. A managerial determination also requires analysis of the

College's decision-making structure, and where Dr. Jorsch as a tenure-track employee fit within that structure.

D. It is Appropriate to Apply Pacific Lutheran

The ALJ is bound to apply established Board precedent which neither the Board nor the Supreme Court has reversed, regardless of contrary decisions by courts of appeals. *Pathmark Stores, Inc.*, 342 NLRB 378 n. 1 (2004).; *Waco, Inc*., 273 NLRB 746, 749 n. 14 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 n. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981). As such, the *Pacific Lutheran* test is the proper test to apply in this case, both in the matter of jurisdiction over Respondent and jurisdiction over Dr. Thomas Jorsch as an employee. But, as noted above, even if the case were decided based on different jurisdictional standards, it would still be the Respondent's burden to make the necessary evidentiary showings to establish lack of jurisdiction. Regardless of what test is applied, there is no evidentiary record to establish Respondent is outside of the Act's jurisdiction. Not only has Respondent not met its burden, Respondent has not made even the most cursory attempt to meet its burden.

E. The Board has Jurisdiction

The Board asserts jurisdiction over private and non-profit colleges and universities with annual gross revenues of $1 million or more. This jurisdictional threshold is set forth in Paragraph 2 of the Consolidated Complaint, along with all other relevant commerce allegations. Additionally, Counsel for the General Counsel introduced, as Exhibits 4(a) and 4(b), Respondent's most recent publicly available form 990 and audited financials. Both documents demonstrate that Respondent meets the relevant commerce thresholds.

Instructively, Respondent's Answer admits all of the commerce allegations with the exception of 2(d), that Respondent has at all material times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Essentially, Respondent does not dispute that it meets the necessary commerce thresholds, but instead claims it is not an employer engaged in commerce within the meaning of the Act because it is a religiously-affiliated college. As discussed above, Respondent did not make the required showings to establish lack of jurisdiction based on its religious affiliation. The record establishes that Respondent meets the commerce thresholds, is covered by the Act, and is subject to Board jurisdiction.

V. STATEMENT OF FACTS

Respondent is organized as a corporation and operates a private nonprofit college in Lindsborg, Kansas. GC Ex. 12, p. 13. Respondent hired Thomas Jorsch to work as an Assistant Professor of History beginning in the fall semester 2014. Tr. 54. Dr. Jorsch's position was a tenure track position. GC Ex. 8. Respondent maintains a College Handbook containing its various rules and procedures, including a confidentiality rule. GC Ex. 12.

The College maintains a written policy regarding the tenure process, also documented in the College's faculty handbook. GC Ex. 12. p. 109, Tr. 65. Under this process, a Faculty Review Committee is convened to review a tenure candidate's portfolio. GC Ex. 12, p. 109, Tr. 66. The Faculty Review Committee submits a recommendation to the College President, who then presents the recommendation to the Board of Directors. GC Ex. 12, p. 110, Tr. 66. If the President disagrees with the Committee's recommendation, the President meets with the Committee to discuss the recommendation. GC Ex. 12, p. 110. If the President ultimately

agrees with the Committee's recommendation, the recommendation is submitted to the Board; if the President disagrees, the recommendation is reported to the Board. GC Ex. 12, p. 110. Faculty members who do not agree with the recommendation sent to the Board can exercise a right of review through the Faculty Grievance Procedure. GC Ex. 12, p. 110.

A Faculty Review Committee was convened to evaluate Thomas Jorsch for tenure in 2016, with the review taking place in November/December of that year. Tr. 66, GC Ex. 13. The Faculty Review Committee recommended Dr. Jorsch for tenure. Tr. 66, GC Ex. 13. During his tenure consideration, Dr. Jorsch was offered and signed a Contract for Employment with Bethany College for the 2017-2018 academic year (2018 Contract) Tr. 73, GC Ex. 15. The cover letter included with the 2018 Contract states, "As you know, you are eligible for tenure promotion pending Board approval. The Faculty Review Committee and the Provsot continue to support their positive recommendation for you." Tr. 75. GC Ex. 15. The recommendation was submitted to the College's President, William Jones, in accord with the College's tenure procedures. Tr. 67-68. President Jones did not follow procedure and submit or recommend the tenure recommendation to the Board of Directors, but instead advised Dr. Jorsch the tenure recommendation was being tabled. Tr. 68. Dr. Jorsch discussed the tabling of his tenure recommendation with Dr. Kristin Van Tassel, the Faculty Chair, and Dr. Joyce Pigge, Dr. Jorsch's direct supervisor. Tr. 70-71.

On May 19, 2017, President Jones met with Dr. Jorsch to discuss a Plan to Achieve Positive Tenure Recommendation (the Plan). Tr. 68, GC Ex. 14. This sort of Plan is not a normal or regular part of the College's tenure process and is not included in tenure process described in the College Handbook. Tr. 70. Unlike the procedures set forward in the College Handbook, the Plan did not include any procedures for review or appeal if Dr. Jorsch was denied

tenure. Tr. 69-70, GC Ex. 14. The Plan gives full authority over the tenure recommendation to President Jones and the College's Provost, with no oversight by faculty or the Faculty Review Committee. Tr. 70, GC Ex. 14. The Plan also contains a confidentiality clause forbidding Dr. Jorsch from discussing the Plan's provisions anyone on campus, any members of the public, or outside organizations. Tr. 70. GC Ex. 14. Dr. Jorsch believed President Jones wanted all portions of the tenure plan kept confidential. Tr. 73.

Dr. Jorsch was concerned about the Plan, because it indicated his tenure recommendation was being tabled due to collegiality issues but did not set specific standards or examples regarding behaviors that were considered not collegial. Tr. 75-76, GC Ex. 14. Dr. Jorsch was also concerned that signing the plan could set a negative precedent that would impact tenure and promotion matters for all other faculty, as all aspects of a professor's employment are impacted by the tenure process. Tr. 76-77. Because of these concerns, Dr. Jorsch reached out to the American Association of University Professors (AAUP) for assistance. Tr. 76-77. The AAUP talked with Dr. Jorsch about his tenure issues and referred Dr. Jorsch to an attorney. Tr. 77. The AAUP also sent a letter to the Higher Learning Commission (HLC), an accrediting body that oversees Bethany College. Tr. 78, GC. Ex.7.

On June 22, 2017, Dr. Jorsch sent an open letter to President Jones via email. Tr. 78, GC Ex. 16. In the open letter, Dr. Jorsch set out his various concerns regarding the Plan, and expressed that a copy of the open letter was being sent to the AAUP and the HLC. Tr. 78-79, GC Ex. 16. Dr. Jorsch copied all faculty on his open letter. Tr. 78-79, GC Ex. 16. Dr. Jorsch included all faculty on the open letter because he believed President Jones's actions regarding the tenure process could impact all faculty. Tr. 79-80. Shortly after sending the open letter, Dr. Jorsch lost access to his College email account. Tr. 80. President William Jones sent a response

to the open letter to all faculty members in which he stated he hoped faculty would not let "veiled threats to Bethany or me made by Dr. Jorsch regarding the Kansas AAUP or HLC sidetrack us from our work." GC Ex. 17. President Jones's response also stated he was keeping the terms of the tenure plan "confidential" and advised the faculty "I do not desire for us to conduct a community-wide email conversation" regarding the College's tenure process. GC Ex. 17. On June 27, 2017, Dr. Jorsch received a certified letter terminating his employment at Bethany College. Tr. 80, GC Ex. 18. The termination letter stated Dr. Jorsch was being discharged for sending the open letter to faculty members and "others." Tr. 83, GC Ex. 18.

Dr. Jorsch's wife, Lisa Guinn, was also employed by Bethany College as a part-time History Professor. Tr. 86, 89. During Spring Semester 2017, Professor Guinn was asked to select the books for the History courses she would teach during Fall Semester 2017. Tr. 92. In early May 2017, Professor Guinn received an email from Dr. Melody Steed, Assistant Dean for Academic Affairs, asking Professor Guinn to teach two freshman courses from the core curriculum during Fall Semester 2017; with these two courses included, Professor Guinn was scheduled to teach nine credit hours. Tr. 93. Professor Guinn received neither a renewal contract nor a notice of non-renewal for Fall Semester 2017. After Dr. Jorsch sent his open letter, Professor Guinn's access to Bethany College email was terminated. Tr. 93. Following the open letter, Dr. Jorsch had a conversation with the History Department Chair, Dr. Joyce Pigge, during which Dr. Pigge stated she was directed that Professor Guinn was no longer to teach History courses. Tr. 87, 93. Professor Guinn had no previous indication from any member of College management that her contract would not be renewed. Tr. 94.

VI. ARGUMENTATION AND ANALYSIS

Because Respondent chose not to comply with the subpoenas, and because Respondent chose not to participate in the hearing or present any evidence, there is nothing in the evidentiary record supporting any of Respondent's claims or denials. The record overwhelmingly demonstrates that Respondent violated the Act as alleged in the Consolidated Complaint and that Professor Jorsh and Professor Guinn are entitled to relief.

A. Legal Standards

1. 8(a)(1) Rule Maintenance

An employer violates Section 8(a)(1) of the Act by maintaining a work rule that would "reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). When evaluating a facially neutral rule, that reasonably interpreted could potentially interfere with NLRA rights, "the Board will evaluate two things: (i) the nature and extent of the potential impact on the NLRA rights, and (ii) legitimate justifications associated with the rule." *The Boeing Company*, 365 NLRB No. 154, p. 3 (2017). The Board will evaluate the rule consistent with the obligation to find an appropriate balance between claimed business justifications and the invasion of employee rights under the Act, focusing on the perspective of employees. *Id.*

2. 8(a)(1) Conduct and Statements

When analyzing 8(a)(1) violations, the basic test is whether considering all of the circumstances, the employer's conduct would reasonably tend to restrain, coerce, or interfere with employee rights provided under Section 7 of the Act. *Mediplex of Danbury*, 314 NLRB 470, 472 (1994). Additionally, "it is well settled that the test of interference, restraint, and coercion

under Section 8(a)(1) of the Act does not turn on the employer's motive or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co.*, 124 NLRB 146, 147 (1959).

3. 8(a)(3) and 8(a)(1)

To establish unlawful discrimination under Section 8(a)(3) and (1) of the National Labor Relations Act, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994) clarifying *NLRB v. Transportation Management*, 462 U.S. 393, 395, 403 n. 7 (1983); *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Evidence that may establish a discriminatory motive—i.e. that the employer's hostility to protected activity "contributed to" its decision to take adverse action against the employee—includes, among other factors, statements of animus directed to the employee or about the employee's protected activities (see, e.g. *Austal USA* 356 NLRB No. 65) and/or statements by the employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employee (see, e.g. *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 616 (1996).

Once the General Counsel has established that the employee's protected activity was a motivating factor in the employer's decision, the employer may defeat a finding of a violation by

establishing, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. See *NLRB v. Transportation Management*, 462 U.S. at 401. The employer has the burden of establishing the affirmative defense.

B. Respondent Maintains An Overly Broad, Illegal Confidentiality Rule

As noted above, Respondent maintains rules, policies, and procedures in a College Handbook. GC Ex. 12. Section 5.20.1 contains a confidentiality provision that reads,

> Bethany's policy is to ensure that its operations, activities, business affairs, and the files of alumni, faculty, employees, and students are kept confidential to the greatest possible extent. During the course of their employment, employees will acquire confidential or proprietary information about Bethany, employees, and its students. Such information shall be kept in strict confidence and not discussed with anyone other than the appropriate Bethany employees. Employees are also responsible for the internal security of such information. Violation of this policy shall subject the employee to disciplinary action up to and including termination of employment. GC Ex. 12, p. 125

The current test for determining whether such a rule is valid involves balancing the potential impact on NLRA rights with the Employer's legitimate justifications for the rule. Here, the Employer offered no justifications at all, legitimate or otherwise, for the portions of this rule which impact NLRA rights. Specifically, the portions of the rule requiring that Bethany's operations, activities, and business affairs be kept strictly confidential directly impact NLRA rights. The categories of "operations, activities, and business affairs" are so broad as to prohibit discussions of salary scales, tenure processes, layoffs, financial retrenchment, and other crucial conditions of employment. Additionally, "files of employees" contain information about wages, benefits, hours of work, and other conditions of employment employees have a Section 7 right to discuss. Because Respondent offered no justifications for this rule, there is nothing to weigh against the rule's potential impact on employees. Accordingly, Respondent's confidentiality rule should be found illegally overbroad and should be revoked.

C. Respondent Seeking Confidentiality of the Tenure Plan Violates Section 8(a)(1)

The Plan for Achieving Positive Tenure Recommendation states, "…by signing below, you are agreeing, committing, and contracting with Bethany College to keeping the contents of this plan confidential and not to discuss or to share any part of it with others. If any part of the agreement is shared on campus, with the public, or with others, you can face legal action." GC Ex. 14. Thomas Jorsch was presented with this Plan for signature during the May 19, 2017 meeting with President William Jones. Tr. 68.

The tenure process impacts all conditions of a professor's employment, as it is the process through which both retention and promotion are determined. Tr. 46-47, 76-77. Respondent's tenure process is set forth in the College handbook. GC Ex. 12, p. 108-109, Tr. 65. Respondent's tenure review considers teaching, scholarship, and service activities, covering the full range of a Professor's professional activities. GC Ex. 12, p. 108. Under Respondent's tenure procedures, a professor denied tenure "will not be offered any future contract by Bethany College." GC Ex. 12, p. 110.

The Plan offered to Thomas Jorsch was not a normal part of the tenure process, in that it differed from what was set forward in the handbook and did not contain any due process provisions. Tr. 69-70, GC Ex. 12, p. 109, GC Ex. 14. The Plan not only impacted the published and acknowledged conditions of employment, but functionally shifted policy making authority regarding the tenure process from the Faculty Senate to the College President. GC Ex. 12, p. 42-42, Tr. 85-86. Faculty Senate has not granted the College President sole authority control tenure recommendations or the tenure process. Tr. 85-86.

The changes to the tenure process itself and the transfer of power to modify the tenure process impact all faculty. These are significant changes not only to conditions of employment, but to the processes by which conditions of employment are determined. Employees have a Section 7 right to discuss these changes. Threatening Dr. Jorsch with legal action if he shared these issues "on campus, with the public, or with others" is clearly an attempt to coerce, interfere, or restrain his exercise of those Section 7 rights and violates Section 8(a)(1) of the Act.

D. President Jones's Response to the Open Letter Violated Section 8(a)(1)

In response to Dr. Jorsch's open letter, President William Jones sent an email to all faculty members in which he stated he hoped faculty would not let "veiled threats to Bethany or me made by Dr. Jorsch regarding the Kansas AAUP or HLC sidetrack us from our work." GC Ex. 17. President Jones's response also stated he was keeping the terms of the tenure plan "confidential" and advised the faculty "I do not desire for us to conduct a community-wide email conversation" regarding the College's mission and core values and their relationship to the tenure process. GC Ex. 17.

President Jones's response expressly discourages any continued discussion of the issues raised in Dr. Jorsch's open letter. Importantly, the open letter raised concerns about President Jones's deviation from the published tenure process and the lack of open and honest communication regarding those changes. GC Ex. 16. As noted above, the tenure process impacts every aspect of a faculty member's employment, and the faculty has Section 7 rights to discuss these issues. President Jones's attempt to shut down and discourage these discussions is a clear and blatant attempt to coerce, interfere with, or restrain exercise of Section 7 rights and violates Section 8(a)(1) of the Act.

E. Thomas Jorsch Was Engaged in Protected Activity

1. **Legal Standard**

Section 7 of the Act protects both union activity and other concerted activity for mutual aid and protection. The Board considers it protected, concerted activity when "individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Myers Industries (Myers II)*, 281 NLRB 882 (1986). Employees do not have to accept an individual's call for group action before the invitation itself is considered concerted. *Cibao Meat Products*, 338 NLRB 934 (2003); Whittaker Corp., 829 NLRB 933, 934 (1988); El Gran Combo, 284 NLRB 1115 (1987). The activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much concerted activity as ordinary group activity. *Myers II* at 884.

2. Jorsch Engaged in Protected Activity

a. Jorsch Engaged in Union Activity

The Act defines labor organization as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." Professor Ronald Barrett, representative of the Kansas AAUP, testified at hearing that the AAUP through its collective bargaining arm "represents faculty members at given institutions around the country" and deals with employers regarding grievances, labor disputes, and rates of pay. Tr. 42-43.

Additionally, the AAUP's own public documents demonstrate it is a labor organization as defined by the Act. GC Ex. 6.

Thomas Jorsch engaged in union activity when he contacted the AAUP to seek assistance regarding the tenure procedure at Bethany College. Tr. 46, 77. He made contact with the AAUP out of concern for institutional integrity at Bethany College, and not because of individual concerns. Tr. 46. Based on Jorsch's outreach, the AAUP took action regarding the tenure process at Bethany College. The AAUP, through research, determined that the tenure process as it was being practiced at Bethany College violated the AAUP's national, state, and local standards. Tr. 47. The AAUP made this determination by talking with various other faculty members at Bethany College and members of University governance. Tr. 49-50.

The AAUP subsequently provided Dr. Jorsch with a referral for legal counsel, and also sent a letter to the HLC, Bethany College's accrediting body, expressing concern about the tenure process at Bethany College. Tr. 48-49, 78, GC Ex. 7. One of the AAUP's biggest concerns was the focus on collegiality, as the AAUP views college or university's focus on collegiality as a way to "short-circuit due process within academia." Tr. 50-51.

Jorsch's outreach to the AAUP, and the AAUP subsequent actions on Jorsch's behalf, make very clear that Jorsch engaged in union activity. Additionally, on June 22, 2017, Dr. Jorsch sent an open letter to Bethany College President William Jones via email. GC Ex. 16. In that email, Jorsch specifically referenced the AAUP's standards on collegiality and its Statement of Principles on Academic Freedom and Tenure, even providing hyper-links to those documents. GC Ex. 16. Further, the email explicitly states it is being copied to the Kansas AAUP leadership. GC Ex. 16. It goes on to say the Kansas AAUP leadership, "will share their concerns with you

and representatives at HLC in hopes of helping Bethany solve its issues pertaining to tenure and promotion, and shared governance." GC Ex. 16. Jorsch's union activity was open and evident.

b. Jorsch Engaged in Concerted Activity for Mutual Aid and Protection

As referenced above, due to Dr. Jorsch's concerns about President William Jones's modifications to the tenure process, on June 22, 2017, Dr. Jorsch sent an open letter to President Jones; the entire faculty was copied on that email. Tr. 78-79, GC Ex. 16. Dr. Jorsch sent the letter because he believed the tenure and promotion process impacted "every faculty member at the College" and that faculty needed to be aware of what was happening "so they could respond accordingly." Tr. 79-80. The tenure process impacts all conditions of a professor's employment. Tr. 76-77. Dr. Jorsch's open letter was designed to initiate and induce group action. It serves not only as an avenue to inform other faculty members of what is occurring with the tenure process, but also as notice that the AAUP would be reaching out to the College and its faculty to try to resolve the issues occurring with the tenure and promotion process and with the College's shared governance system. The open letter is essentially a call to arms, seeking to involve all faculty.

That the open letter was a call to group action is evident based on its content. It points out each deviation from the published tenure process, and references AAUP standards on collegiality, academic freedom, and tenure. GC Ex. 16. The open letter also calls out the fact that President Jones completely disregarded the opinions of faculty members and the Faculty Review Committee when considering Dr. Jorsch's tenure application. GC Ex. 16. Dr. Jorsch wrote, "I can't allow my case to be used as precedent for heavy-handed use of power by the

President…your action concerning me could open the door to presidential decisions on tenure based on any kind of behavior your deem inappropriate and it could have a chilling effect on academic freedom at Bethany. I can't allow myself to be that precedent; the school and my colleagues mean too much to me." GC Ex. 16. Dr. Jorsch also wrote, "While I am hopeful you will change your mind, support my tenure and promotion, and send it to the Board of Directors for their approval, I am more concerned about the fair treatment of current and future faculty." GC Ex. 16.

The open letter is an invitation to group action, and by its express language was sent for mutual aid and protection.

F. Respondent Was Aware of Jorsch's Union and Protected Activity

The record makes abundantly clear that Respondent was well aware of Jorsch's Union and Protected Activity. The open letter, which as detailed above both described protected activity and was in and of itself protected activity, was sent to President William Jones, Respondent's agent and supervisor. Jones's status as agent and supervisor is evidenced by the powers granted to him in Respondent's bylaws and by the fact that he had the power to both hire and fire. GC Ex. 12, p. 31, GC Ex 15, GC Ex 19. There is no doubt Jones received the open letter, because he issued a response. GC Ex. 17. Jones's response characterizes Dr. Jorsch's mentions of the Kansas AAUP as "angry, veiled threats" clearly displaying animus towards both Dr. Jorsch and the labor organization. GC Ex. 17.

G. Thomas Jorsch Was Discharged for His Protected Activity

Dr. Jorsch's protected activity did not just contribute to his discharge, it was the sole reason for his discharge. The termination letter sent to Dr. Jorsch states, "…when you chose to

send your letter to the entire campus faculty and others, that type of behavior crossed a professional line and cannot be tolerated." GC Ex. 18. Dr. Jorsch sent a communication to his colleagues and to a labor organization regarding a condition of employment that impacts all college faculty, and was openly discharged for that communication. There is no disputing this point, as it is expressly set forward in writing by the College's President.

H. The Termination Letter Itself Violates Section 8(a)(1)

As referenced above, Dr. Jorsch's termination letter expressly states his discharge is due to Dr. Jorsch sending a communication to other faculty members and to a labor organization regarding a condition of employment that impacts all faculty. GC Ex. 18. It was explicit that Dr. Jorsch was being dismissed for engaging in protected, concerted activity. There are few actions that tend to interfere with, restrain, or coerce the exercise of Section 7 rights more than the written statement of an organization's highest officer communicating that exercise of those rights results in discharge. President Jones's termination letter to Dr. Jorsch was certainly intended to interfere with, restrain or coerce the exercise of Section 7 rights and the contents of that letter violate Section 8(a)(1).

I. Lisa Guinn Was Discharged Due to Her Husband's Protected Activity

Dr. Jorsch's wife, Professor Lisa Guinn, was also employed as a History Professor at Bethany College. Tr. 88-89. She was employed part-time, and was a negotiated spousal hire. Tr. 89. During spring semester 2017, Professor Guinn received an email form her supervisor asking Professor Guinn to pick the books for the classes Professor Guinn would teach during Fall 2017. Tr. 92. Also during spring semester 2017, Professor Guinn received an email from the Assistant Dean for Academic Affairs asking Professor Guinn to teach two freshman courses

form the core curriculum in Fall 2017. Tr. 93. Based on communications with her direct supervisor and with the Assistant Dean for Academic Affairs, Professor Guinn believed she would be teaching nine credit hours during fall semester 2017. However, Professor Guinn did not receive either a contract or a notice of non-renewal. Tr. 93.

Shortly following Thomas Jorsch's open letter to College President Jones, Professor Guinn's access to college email and college electronic systems was cut off. Tr. 93. Professor Guinn received neither a renewal notice nor a termination letter and is no longer teaching at Bethany College. Tr. 93. The evidence supports a conclusion that she was discharged due to her husband's protected activity. Prior to Jorsch sending the open letter, Professor Guinn had no indication from any member of Bethany College management or faculty that her contract would not be renewed. Tr. 94. Additionally, following the open letter, the Chair of the History and Political Science Department, Professor Joyce Pigge, communicated she had been told by College administration that Professor Guinn was "off of the table" as an option to teach history classes. Tr. 87, 93.

There was no evidence offered to dispute that Professor Guinn was discharged due to her husband's protected activity. Her access to Respondent's email and online systems was cut in close proximity to Dr. Jorsch sending the open letter, something that had not happened before during her employment. Prior to her email being deactivated, all communications Professor Guinn received from Respondent's management indicated she would be renewed to teach during Fall 2017. The record demonstrates that Professor Jorsch engaged in protected, concerted, and union activity, and also demonstrates Respondent's animus towards that activity. The record further demonstrates that Professor Guinn was a negotiated spousal hire, indicating that Respondent likely viewed she and Professor Jorsch as a package deal. The preponderance of the

evidence indicates Professor Guinn, along with Professor Jorsch, was unlawfully discharged because of protected, concerted, and union activity.

VII. CONCLUSION

For the reasons set forth above, the Record establishes Respondent violated Section 8(a)(1) through its maintenance of an overly broad, unlawful confidentiality rule, through its agent William Jones asking Thomas Jorsch not to disclose the proposed tenure plan, by its agent William Jones sending an email prohibiting employees from discussing terms and conditions of employment, and by informing employees Thomas Jorsch and Lisa Guinn they were being discharged for engaging in protected, concerted activities. Also as set forth above, the Record establishes Respondent violated Section 8(a)(1) and 8(a)(3) for discharging Thomas Jorsch and Lisa Guinn for engaging in Union and protected, concerted activity and to discourage employees from engaging in Union and protected, concerted activity.

VIII. REMEDIES

As pled in the Complaint, Counsel for the General Counsel requests an Order requiring that, at a meeting or meetings scheduled to ensure the widest possible attendance, Respondent's representative William Jones read the notice to employees on work time in the presence of a Board agent. The Board has previously required that notices be read aloud by members of management or a Board agent when serious unfair labor practices were committed by management officials. *Allied Medical Transport, Inc.*, supra. at 6 fn. 9 (2014).

Counsel for the General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

Respectfully Submitted,

/s/ Rebecca Proctor

Rebecca Proctor
Counsel for the General Counsel

Date: January 10, 2018